JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 39

RICHARD HALL AND CHRISTINE HALL
APPELLANTS,

v.

HARRIET BEALS, CLERK AND RECORDER OF EL PASO COUNTY, AND BESS TITUS, ELECTION SUPERVISOR OF EL PASO COUNTY,
APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF AMICUS CURIAE FOR HARVEY M. BURG IN SUPPORT OF APPELLANTS

HARVEY M. BURG
HERBERT TEITELBAUM
CHARLES P. GAMER
Amicus Curiae
1 Federal Street
Boston, Massachusetts

Blanchard Press, Inc., Boston, Mass. — Law Printers

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PART I

Interest of Amicus Curiae — Effect of HALL on Amicus

Amicus, plaintiff in *Burg et al v. Canniffe et al*, case number CA 69-855-C, presently being considered by a Three-

Judge Court of the United States District Court for the District of Massachusetts, has a direct interest in the outcome of *Hall* v. *Beals*. Amicus was denied the right to vote in a Congressional election for the United States House of Representatives because of his failure to comply with durational residence requirements under Massachusetts law. The Three-Judge Court sitting in the *Burg* case issued a continuance which specified that the Court would not decide *Burg* until the United States Supreme Court decided *Hall* v. *Beals*. A copy of that order appears herein as Exhibit "A".

Amicus is filing this Brief to apprise the Court of the circumstances and facts of the Massachusetts case so that the Court may duly consider the effect its ruling in *Hall* v. *Beals* will have upon the Massachusetts case. Amicus does not possess sufficient factual knowledge of the Colorado case to recommend a ruling therein with a reasonable degree of certainty. Amicus actually received its Court Order less than one week ago. However, amicus believes that it can contribute to the Court's effort to decide *Hall* v. *Beals* by discussing the law which should be applied to the Colorado question.

Amicus' case, a class action requesting declaratory and injunctive relief, challenges the constitutionality of Amended Article III of the Constitution of the Commonwealth of Massachusetts and its statutory analogue M.G.L.A. c. 51, Sec. 1 (copies of which appear herein as Exhibit "B") which contain the durational residence requirements imposed upon would-be voters in the Congressional election within the Commonwealth. According to the laws of the Commonwealth, proof of domicile is *per se* insufficient to qualify an individual to vote in federal and state elections.

Rather, persons after establishing all other incidents of residency or domicile, must reside within the Commonwealth for one year and in the city or town wherein they seek to vote for six months next preceding an election.

In *Burg* v. *Canniffe*, *supra*, the plaintiff although residing six months within the Town of Marblehead, had not resided one year within the Commonwealth of Massachusetts when he attempted to register to vote in the special Congressional Election and a Primary preliminary thereto. At plaintiff's request, the Court granted interim relief to plaintiff and members of his class pending final decision on the merits. See Exhibits "C" and "D" hereto.

Burg was argued before the Three-Judge Court on September 19, 1969. Although no testimony was permitted, the facts asserted by plaintiffs were taken as well pleaded and the case was argued on its merits. Amicus sets out material facts in its own case for the Court's consideration for comparative purposes.

In Amicus' case, plaintiffs alleged material facts to be as follows:

1. Registration is permitted up to thirty-one and in some cases twenty days preceding an election. See M.G.L.A. c. 51, Sec. 26.

2. Neither one year nor six months is *in fact* required by Boards of Registrars in the Commonwealth to administer the statute, preserve the purity of elections, or insure intelligent exercise of the right to vote. The Board of Registrars of the Town of Marblehead had no procedure for investigating registration applicants other than checking lists of residents compiled every year on or about the first of the year. If an applicant's name did not appear thereon,

the Board would register the individual upon that person's execution of an affidavit, a specimen of which appears herein as Exhibit "E".

3. In Presidential elections the Commonwealth of Massachusetts has acknowledged the lack of compelling governmental interest to require a durational waiting period once domicile for other state purposes is established. The Commonwealth permits a person, otherwise qualified, to *vote* for Presidential and Vice Presidential elections after being domiciled in Massachusetts for 31 days and upon the execution of an affidavit, a reproduction of which is attached hereto as Exhibit "F". See M.G.L., c. 51, Sec. 1A.

4. At least 75,000 persons 20 years of age and older probably moved into the state of Massachusetts between March 15, 1968 and March 15, 1969, according to expert testimony which plaintiffs offered to present to that Court.

5. Plaintiffs in Massachusetts, as are Colorado domiciliaries, are subjected to the obligations of citizen-domiciliaries upon actually residing 30 days within the Commonwealth. Motor Vehicles must be registered, income and inheritance taxes must be paid, children must be sent to schools, etc.

In *Burg* plaintiffs challenge the constitutionality of a durational requirement of one year. The Massachusetts statute also discriminates against plaintiff in that plaintiff by moving to Massachusetts from out of state, must wait six months longer to vote in his town than a similarly newly arrived domiciliary to the town who moved from another district, but somewhere within the Commonwealth's borders. The Court in *Burg* may only grant relief to plaintiffs on the basis of this discrimination. Either way, the Three-Judge Court is looking for guidance in terms of law and its application to the facts.

PART II

The Colorado law must be declared unconstitutional unless it withstands Judicial Scrutiny under the "Compelling Governmental Interest" test.

Durational residency requirements which constitute a condition precedent to the exercise of the vote in either Presidential or Congressional elections necessarily invade several fundamental rights protected by the United States Constitution. By denying certain individuals the opportunity to cast a ballot, the State is restricting the exercise of a fundamental political and constitutional right. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370; *Reynolds* v. *Sims*, 377 U.S. 533, 561; *Harper* v. *Virginia State Bd. of Electors*, 383 U.S. 663, 670; *Carrington* v. *Rash*, 380 U.S. 89, 96; see also *United States* v. *Classic*, 313 U.S. 299, 314-315.

Moreover, the right to vote in federal elections is protected by the First Amendment. *Hadnott* v. *Amos*, 394 U.S. 358; See, *Brief* of Amicus Curiae American Civil Liberties Union pp. 4-12 filed in this case.

A state statute which denies the right to vote to those United States citizens who choose to move interstate denies, chills, burdens or penalizes the constitutionally protected freedom to travel across interstate borders throughout this Nation. Although the derivation of the right to freely travel is a question of some dispute, it has been well settled that the right is of constitutional stature. *United States* v. *Guest*, 383 U.S. 745, 758; *Edwards* v. *California*, 314 U.S. 160; *Shapiro* v. *Thompson*, 37 U.S.L.W. 4333 (April 21, 1969). Clearly, one who is considering changing his domicile is forced by most, if not all, state durational residency statutes to choose between the assertion of one constitutional guarantee at the expense of giving up another —the right to vote for the right to travel interstate and

establish residency in a new state. Either right may be exercised only if the other is surrendered. A forced selection between two constitutional rights, indeed, chills, burdens and penalizes the right which is eventually exercised, and, in fact, denies the right which is foregone. This Court has firmly established that an individual has a right to travel without being subject to these encumbrances. *Shapiro v. Thompson, supra.*

Furthermore, forcing an individual to choose one constitutional right at the expense of another is, in itself, an infringement of that individual's right not to be forced to so choose. A state statutory and or constitutional scheme which compels an individual to relinquish one constitutional right in order to preserve another "whipsaws" that individual and thereby affronts the dictates of Due Process. See *United States v. Jackson*, 390 U.S. 570. As this Court declared in *Aptheker v. Secretary of State*, 378 U.S. 500, 507:

> The restrictive effect of the legislation cannot be gainsaid by emphasizing, as the government seems to do, that a member of a registering organization could recapture his freedom to travel by simply in good faith abandoning his membership in the organization. Since freedom of association is itself guaranteed by the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given organization.

Accord, *Shapiro v. Thompson, supra.*

By subjecting the interstate traveler to infringements on his rights to vote, to travel, and to not be "whipsawed",

Colorado, Massachusetts, and every other state in the Union treats one class of individuals (those who travel interstate and who cannot vote for reason of durational residency requirements in federal elections) differently from another class of citizens (those who do not travel interstate and can vote in federal elections). This difference in treatment by the states is subject always to the standards of Equal Protection of the Fourteenth Amendment.

However, when a statute treats individuals differently by denying constitutional rights to one, and affording them to another, this Court has supplemented an older, less exacting, less scrutinizing test of constitutional compliance — which required a mere showing of a rational or reasonable relationship between the statutory classification and the end sought by the legislation (which must be deemed to have a legitimate purpose). *Harper* v. *Virginia Bd. of Elections, supra.* Instead, today, this Court holds that when a party seeks to exercise a fundamental constitutional right, such as the rights to vote and to travel, any statutory classification which serves to proscribe or penalize these rights is unconstitutional unless it meets the exacting standards developed by this Court and characterized by parties and amicus as the "compelling governmental interest" test. See, *Shapiro* v. *Thompson, supra*; *Williams* v. *Rhodes*, 393 U.S. 23; *Kramer* v. *Union Free School District*, 37 U.S.L.W. 4530 (June 16, 1969); and *United States* v. *Jackson, supra.* Briefly, the so-called "compelling governmental interest" doctrine developed in these cases requires the following questions to be asked:

> (a) Does the statutory classification deny, chill, burden, or penalize the assertion of a constitutionally protected right?

(b) Is the purpose sought to be achieved by the statute legitimate or permissible?

(c) Is there a compelling governmental interest to which the state has addressed itself?

(d) Are the restrictions or classifications imposed necessary to serve the compelling governmental interest?

(e) Are the restrictions sufficiently tailored, i.e., drawn so that they are not overbroad?

(f) Are there other alternatives by which the governmental interest can be achieved without invading the constitutionally protected right?

A statute which by its classification denies, chills, burdens, or penalizes the assertion of a constitutionally protected right can only pass constitutional muster if:

(1) The purpose of the statute is constitutionally legitimate or permissible; and

(2) The statute serves a compelling governmental interest; and

(3) The restrictions or classifications are in fact necessary to serve the compelling governmental interest; and

(4) The restrictions are sufficiently tailored and not overbroad; and

(5) There are no other alternatives by which the governmental interest can be achieved without invading constitutionally protected rights.

The application of these standards is based upon a factual analysis of the circumstances presented. *Williams v. Rhodes*, *supra*, at p. 30.

Amicus is not familiar with the circumstances relevant to the Colorado two month durational residency require-

ment. However, in amicus' case, the Massachusetts statutory and constitutional requirements do not fulfill the standards employed by this Court and, are, therefore, unconstitutional. Whether or not the purpose of the statute is legitimate is subject only to conjecture. But, assuming legitimacy, and assuming a compelling governmental interest, one year is longer than necessary to achieve any goals sought by Massachusetts (e.g. prevention of fraud, administrative necessity, etc. etc.). Indeed, Massachusetts apparently admits this by requiring 31 days residency for presidential elections. Therefore, the statute is not sufficiently tailored as required in *Kramer*, *supra*. In addition, there are other alternatives available to the state to achieve its aims—criminal statutes to deter fraud, and the use of tax rolls, automobile registration, place of employment and residency, as well as sworn affidavits by a prospective voter as to his domicile to determine whether an individual is a bona fide domiciliary of a state and district. See *United States* v. *Jackson*, *supra*.

Amicus believes that a state's interest in an individual's knowledge of, familiarity with, and sharing in local interests with, is not a permissible governmental interest. See Amicus Curiae Brief of American Civil Liberties Union, pp. 27-28. Amicus is aware that the states are granted the authority to determine voter qualifications through the United States Constitution. However, this Court has often stated that a State cannot exercise its authority in a manner which contravenes the other provisions of the Constitution. See *Katzenbach* v. *Morgan*, 384 U.S. 641, 647 and cases cited therein. *Harper* v. *Virginia Bd. of Elections*, *supra*; *Carrington* v. *Rash*, *supra*. See also *United States* v. *Mississippi*, 380 U.S. 128; *Louisiana* v. *United States*, 380 U.S. 145, 151; *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45; *Pope* v. *Williams*, 193 U.S. 621, 632-634; *Minor* v. *Happersett*, 21 Wall. 162). Cf. *Bacus* v. *Richardson*, 384

U.S. 73, 92.]; *Reynolds* v. *Sims*, 377 U.S. 533. Accordingly, when the state exercises its authority through Article II, Section 1, and Article I, Section 2, and invades areas of constitutionally protected freedoms, this Court must scrutinize that invasion by an exacting factual analysis pursuant to the standards developed by this Court.

PART III

HALL and BURG in context — Similarities and Differences

The plaintiffs in Burg have argued that decisions of this Court subsequent to *Drueding* v. *Devlin*, 234 F. Supp. 721 (D. Md. 1964), aff'd per curiam, 380 U.S. 125 (1965) have changed the standard to be applied in determining the constitutionality of a durational residency requirement imposed by a state as a qualification for voting in an election, from "reasonableness" to "compelling state interest". Under the latter test, the burden is on the state to demonstrate that its durational residency requirement is in fact necessary for the purposes to be accomplished and is sufficiently tailored so as not to infringe more than is necessary on the right to vote. The plaintiffs have argued that the durational residency requirement in Mass. G.L. c. 51, Sec. 1, and Amended Article III of the Massachusetts Constitution is unconstitutional as an infringement on their rights to vote and to travel from one state to another. Thus, in respect to the theories relied upon by the respective plaintiffs, *Hall* v. *Beals* is similar to *Burg* v. *Canniffe*. However, there are important differences, which the Court should bear in mind in deciding *Hall*.

First, the portion of the Constitution which is interpreted as giving the states the power to determine the qualifications of voters in a presidential election is Article II, Section 1. In fact, the section does not make an

explicit grant of this power." In *Burg*, the relevant portion of the Constitution is Article I, Section 2, which requires that persons voting for the House of Representatives "have the qualifications requisite for electors of the most numerous branch of the State legislature." The latter section raises questions of federalism and accommodation between state and federal interests which do not seem to be present in the language of Article II, Section 1.

Second, each case involving the constitutionality of a durational residency requirement and thus requiring the Court to apply the "compelling state interest" test must be decided on its own facts. The length of the durational residency requirement, which is either six months or two months in *Hall* and one year in *Burg*, is only one factor to be considered among others. A durational residency requirement which is constitutional for a congressional election in Massachusetts may not be constitutional if applied to a presidential election or even to a congressional election in New York. Furthermore, neither *Hall* nor *Burg* involves durational residency requirements for voting in [redacted] county or municipal elections. The constitutionality of a durational residency requirement in a local election may involve very different issues of law and fact from the same questions arising in an election for a federal office. In deciding *Hall*, which involves a short residency requirement, the Court should be careful not to foreclose challenges of durational residency requirements presenting different facts, issues and evidence.

Third, the durational residency requirements in Mass. G.L. c. 51, Sec. 1, and Amended Article III of the Massachusetts Constitution, which are incorporated into Article I, Section 2, of the Constitution, treat persons moving into a city or town in Massachusetts from another state differently than they do persons moving from one city or town

within the Commonwealth to another such city or town. The plaintiffs have alleged in their complaint that this difference in treatment discriminates against persons moving into Massachusetts from another state and therefore violates the Equal Protection clause of the Fourteenth Amendment of the federal Constitution. This feature of Massachusetts law involved in *Burg* is without parallel in the Colorado statute involved in *Hall*, and hence the issue of discrimination in applying a durational residency requirement is not before the Court in *Hall*.

In conclusion, while *Burg* and *Hall* may involve certain common questions, there are significant differences between the cases. The Court should consider these differences in deciding *Hall* in view of the order of the Three-Judge court in *Burg*, which is Exhibit "A".

Harvey M. Burg
Herbert Tefferteller
Charles P. Gamer
Amicus Curiae
1 Federal Street
Boston, Massachusetts

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 69-865-C

HARVEY M. BURG,
individually, and on behalf of all
others similarly situated

v.

JAMES E. CANNATTE, ET AL.

ORDER

September 26, 1969

It appearing that the case of *Hall* v. *Beals*, 292 F. Supp. 610 (D.C. Colo. 1968), presents similar issues to those involved in the instant case, and it further appearing that the Supreme Court of the United States has noted probable jurisdiction in *Hall* v. *Beals*, which is now No. 39 on the 1969-70 Appellate Docket of the Supreme Court of the United States, it is hereby

ORDERED that the instant case be continued until further order of this court.

(s) EDWARD M. MCENTEE
U.S. Circuit Judge

(s) ANDREW A. CAFFREY
U.S. District Judge

(s) HUGH H. BOWNES
U.S. District Judge

EXHIBIT B

Amend. Art. 3 Constitution of Massachusetts

Art. III. Qualifications of voters for governor, lieutenant governor, senators and representatives

ART. III. Every citizen of twenty-one years of age and upwards, excepting paupers and persons under guardianship and persons temporarily or permanently disqualified by law because of corrupt practices in respect to elections who shall have resided within the commonwealth one year, and within the town or district in which he may claim a right to vote, six calendar months next preceding any election of governor, lieutenant governor, senators, or representatives, shall have a right to vote in such election of governor, lieutenant governor, senators and representatives; and no other person shall be entitled to vote in such election.

M.G.L., c. 51, Sec. 1

QUALIFICATIONS OF VOTERS.

SECTION 1. Except as otherwise provided in section one A, every citizen twenty one years of age or older, not being a pauper or person under guardianship and not being temporarily or permanently disqualified by law because of corrupt practices in respect to elections, who can read the constitution of the commonwealth in English and write his name, and who has resided in the commonwealth one year and in the city or town where he claims the right to vote six months last preceding a state, city or town election, and who has complied with the requirements of this chapter, may have his name entered on the list of voters in such city or town, and may vote therein in any such election or, except in so far as restricted in any town in which a representative town meeting form of government has been es-

tablished, in any meeting held for the transaction of town affairs. No other person shall have his name entered upon the list of voters or have the right to vote; except that no person who is prevented from reading or writing as aforesaid by a physical disability, shall, if otherwise qualified, be deprived of the right to vote by reason of not being able so to read or write; and no veteran if otherwise qualified to vote, shall be disqualified therefrom on account of receiving or having received aid from any city or town; and no person otherwise qualified to vote for national or state officers shall, by reason of a change of residence within the commonwealth, be disqualified from voting for such officers in the city or town from which he has removed his residence until the expiration of six months from such removal. A married woman shall be eligible to vote and to register for the purpose of voting in the city or town where she resides.

No person who actually supports himself and his family shall be deemed to be a pauper under this section by reason of the commitment of his wife, child or other relative to a state hospital or institution of charity, reform or correction by order of a court or magistrate, and of his inability to maintain such person therein; or who, to the best of his ability, has attempted to provide for himself and his dependents and has not been a mendicant, and who, through no crime or misdemeanor of his own, has come into grievous need and receives aid or assistance.

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 69-855-C

HARVEY M. BURG,
individually, and on behalf of all
others similarly situated

v.

JAMES E. CANNIFFE, CHARLES T. KELLEY,
JACQUELINE G. WILLIAMS, BETTY J. BROWN,
all members of the Board of Registrars of the
Town of Marblehead

ORDER
August 25, 1969

WYZANSKI, *Chief Judge*

Defendants are ordered to supply on primary and election days to the Clerk of the United States District Court a single copy of a ballot on each day, and on those days, plaintiff, if he wishes, may come to the clerk's office to mark the ballot on each occasion, to seal it, and to deliver it to the clerk.

(s) CHARLES E. WYZANSKI, JR.
Chief Judge

By the Court,
(s) RUSSELL H.
Clerk.

EXHIBIT D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 69-855-C

HARVEY M. BURG,
individually, and on behalf of all
other similarly situated
v.
JAMES E. CANNIFFE, ET AL.

ORDER

September 26, 1969

Defendants, Canniffe, Kelley, Williams, and Brown, are ordered to supply to the Clerk of this Court on or before Election Day, Tuesday, September 30, 1969, a ballot for the special election in the Sixth Massachusetts Congressional District, for plaintiff, and, if requested, a ballot for anyone else similarly situated.

Plaintiff, or anyone else similarly situated, may come to the Clerk's office, Room 1525, United States Courthouse, Boston, on Tuesday, September 30, 1969, to vote, to seal the ballot in an envelope, and to deliver it to the Clerk, who shall impound it pending further order of the Court.

(s) EDWARD M. McENTEE
U.S. Circuit Judge
(s) ANDREW A. CAFFREY
U.S. District Judge
(s) HUGH H. BOWNES
U.S. District Judge

EXHIBIT E

EXHIBIT F

THE COMMONWEALTH OF MASSACHUSETTS
SECRETARY OF THE COMMONWEALTH

Partial Ballot Application

, hereby make application to qualify for voting for electors for president and vice president only, as authorized by section one A of chapter fifty one of the General Laws at the election to be held in the city or town of on November , 19 .

I do solemnly swear that I now reside at in the city or town of in the Commonwealth of Massachusetts; that I have resided in the Commonwealth of Massachusetts since ; and that, immediately previous to coming to the Commonwealth of Massachusetts to reside, I resided at in the city or town of in the state of , where I was a qualified voter or where I would have been eligible to qualify as a voter but I remained at such residence.

(If applicant is a person not in active military service and is living on land within the Commonwealth of Massachusetts purchased by or ceded to the United States government, the following statement is to be made in lieu of the foregoing:

I do solemnly swear that I am not in active military service and that I am now living on land located within the limits of the city or town of which has been purchased by or ceded to the United States government, and that I have lived thereon since .)

The date of my birth was . The place of my birth was

PER CURIAM

HALL ET UX. *v.* BEALS, CLERK AND RECORDER OF EL PASO COUNTY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

No. 69. Argued October 17, 1969. Decided November 24, 1969.

Appellants, who moved to Colorado in June 1968, were refused permission to vote in the November 1968 presidential election because they could not meet Colorado's six-month statutory residency requirement. They brought this class action challenging the constitutionality of that restriction and seeking declaratory, mandamus and injunctive relief. The District Court upheld the statute and dismissed the complaint. After appellants appealed to this Court, the residency period for presidential elections was reduced to two months, and appellants also challenge that requirement in this Court. *Held*:

1. The amendment of the residency statute, under which appellants could have voted in the 1968 election, has mooted this case.

2. Appellants cannot represent a class (here Colorado voters disqualified by the two-month requirement) to which they never belonged.

3. The contingencies which would have to occur before appellants could be disenfranchised in Colorado in the next presidential election are too speculative to warrant this Court's passing on the substantive issues of this case. *Moore v. Ogilvie*, 394 U. S. 814, distinguished.

306 F. Supp. 418, vacated and remanded.

Richard Hall argued the cause pro se and for other appellant.

Bernard B. Baker argued the cause for appellees. With him on the brief were *Carroll L. Wolfe* and *Robert L. Russel*.

Briefs of amici curiae urging reversal were filed by *Solicitor General Griswold*, *Assistant Attorney General Leonard*, *Louis F. Claiborne*, and *Francis A. Keating, II*.

for the United States, by *William F. Reynard*, *Melvin L. Wulf* and *Eleanor Holmes Norton* for the American Civil Liberties Union et al.; by *Joseph L. Rauh, Jr.*, *John Silard*, and *Elliott C. Lichtman* for the Bipartisan Committee on Absentee Voting; and by Harvey M. Burg.

Louis J. Lefkowitz, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Brenda Soloff*, Assistant Attorney General, filed a brief for the State of New York as *amicus curiae* urging affirmance.

PER CURIAM.

The appellants moved from California to Colorado in June 1968. They sought to register to vote in the ensuing November presidential election, but were refused permission because they would not on election day have satisfied the six-month residency requirement that Colorado then imposed for eligibility to vote in such an election.[1] The appellants then commenced the present

[1] Colo. Rev. Stat. Ann. § 49-24-1 (1963) provided:

"*Eligibility of new resident to vote.*—Any citizen of the United States who shall have attained the age of twenty-one years, shall have resided in this state not less than six months next preceding the election at which he offers to vote, in the county or city and county not less than ninety days, and in the precinct not less than thirty days, and shall have been duly registered as required by the provisions of this article, shall have the right to vote as a new resident for presidential and vice presidential electors."

The appellant Richard Hall went to the office of the appellee Beile on or about August 1, 1968, to request that his wife and he be allowed to vote in the presidential election. Upon denial of his application, he wrote to the Colorado Secretary of State to ask that his wife and he be allowed to vote despite the six-month residency requirement. On September 6 the State Election Office informed the appellants they would not be permitted to vote.

Apart from the special provision relating to the eligibility of new residents to vote in a presidential election, Colorado requires that

class action against the appellees, electoral officials of El Paso County, Colorado. Their complaint challenged the six-month residency requirement as a violation of the Equal Protection, Due Process, and Privilege and Immunities Clauses of the Constitution. For relief they sought (1) a writ of mandamus compelling the appellees to register them for the upcoming presidential election; (2) an injunction restraining the enforcement and operation of the Colorado residency laws insofar as they applied to the presidential election; and (3) a direction that the appellees register the appellants and allow them to vote "on a conditional basis, so that should either party choose to appeal to the Supreme Court of the United States and such appeal should run past the time of the National Election on November 5, 1968 . . . the relief sought by [the appellants will] not become moot."

On October 30 the three-judge District Court entered judgment for the appellees and dismissed the complaint, holding that the six-month requirement was not unconstitutional. *Hall* v. *Beals*, 292 F. Supp. 610 (D. Colo.). As a result the appellants did not vote in the 1968 presidential election. They took a direct appeal to this Court pursuant to 28 U. S. C. § 1253; and we noted

probable jurisdiction, 394 U. S. 1011. Thereafter the Colorado Legislature reduced the residency requirement for a presidential election from six months to two months.

The 1968 election is history, and it is now impossible to grant the appellants the relief they sought in the District Court. Further, the appellants have now satisfied the six-month residency requirement of which they complained. But apart from these considerations, the recent amendatory action of the Colorado Legislature has surely operated to render this case moot. We review the judgment below in light of the Colorado statute as it now stands, not as it once did. *Thorpe* v. *Housing Authority*, 393 U. S. 268, 281-282; *United States* v. *Alabama*, 362 U. S. 602, 604; *Hines* v. *Davidowitz*, 312 U. S. 52, 60; *Carpenter* v. *Wabash R. Co.*, 309 U. S. 23, 26-27; *United States* v. *Schooner Peggy*, 1 Cranch 103, 110. And under the statute as currently written, the appellants could have voted in the 1968 presidential election. The case has therefore lost its character as a present live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law. *Golden* v. *Zwickler*, 394 U. S. 103, 110; *Baker* v. *Carr*, 369 U. S. 186, 204; *Miller* v. *Green*, 150 U. S. 651, 653.

The appellants object now to the two-month residence requirement as vigorously as they did to the six-month rule in effect when they brought suit. They say that such statutes in Colorado and elsewhere continue to have an adverse effect upon millions of citizens throughout the Nation. But the appellants' opposition to residency requirements in general cannot alter the fact that so far as they are concerned nothing in the Colorado legislative scheme as now written adversely affects either their present interests or their interests at the time this litigation was commenced. Nor does the result differ

because the appellants denominated their suit a class action on behalf of disenfranchised voters. The appellants "cannot represent a class of [which] they are not a part." *Bailey* v. *Patterson*, 369 U. S. 31, 32-33, that is, the class of voters disqualified in Colorado by virtue of the new two-month requirement, a class of which the appellants have never been members.

Nothing in *Moore* v. *Ogilvie*, 394 U. S. 814, is to the contrary. There we invalidated an Illinois statute requiring that independent candidates for presidential elector obtain signatures on their nominating petitions from voters distributed through the State. We noted that even though the 1968 election was over, "the burden placed on the nomination of candidates for statewide offices remains and controls future elections, as long as Illinois maintains her present system as she has done since 1935." 394 U. S., at 816. The problem before us was "capable of repetition, yet evading review," not only because the same restriction on Moore's candidacy that had adversely affected him in 1968 could do so again in 1972, but because Illinois, far from having altered its statutory scheme for the future benefit of those situated similarly to Moore, had adhered for over 30 years to the same electoral policy, with no indication of change.

Here, by contrast, the appellants will face disenfranchisement in Colorado in 1972 only in the unlikely event that they first move out of the State and then re-establish residence there within two months of the presidential election in that year. Or they may take up residence in some other State and in 1972 face disqualification under *that* State's law. But such speculative contingencies afford no basis for our passing on the substantive issues the appellants would have us decide with respect

to the new amended law of Colorado. *Golden v. Zwickler*, *supra*.

The judgment of the District Court is vacated and the case is remanded with directions to dismiss the cause as moot.

It is so ordered.

MR. JUSTICE BRENNAN, dissenting.

I dissent from the direction to dismiss this case as moot. *Moore v. Ogilvie*, 394 U. S. 814 (1969), involved a challenge to the constitutionality of a statute which had been invoked to deny the appellants a place on the 1968 ballot. We were not persuaded in that case by the argument that the appeal should be dismissed since the 1968 election had been held and there was no possibility of granting any relief to appellants. Even though appellants did not allege they would seek a place on the ballot at future elections, we held that the constitutional question was one capable of repetition, yet evading review. *Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498, 515 (1911), and therefore that mootness would not prevent our decision of its merits. In my view the present case is an even stronger one for application of that principle. At stake here is the fundamental right to vote, the right "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U. S. 533, 562 (1964); see also *Harper v. Virginia Board of Elections*, 383 U. S. 663, 670 (1966); and the constitutional challenge to the amended Colorado statute is peculiarly evasive of review. This is because ordinarily a person's standing to raise that question would not mature unless he had become a Colorado resident within two months prior to a presidential election. Barring resort to extraordinary expedients, that interval is obviously too short for the exhaustion of state administrative remedies and the completion of a lawsuit through filing in the

complaint in a federal district court, convening of a three-judge court, trial, and review by this Court.* True, today's virtual foreclosure of any opportunity for definitive judicial review may in some measure be prevented by resort to waiver of the requirement of exhaustion of administrative remedies, preferred calendar position, or even relaxation of the rules of ripeness to permit a person not yet a resident to challenge the statute on a showing of reasonable certainty that he would be moving to the State within the two-month period. But the difficulties which attend these expedients only buttress my conclusion that, if mootness did not bar decision of the constitutional question in *Moore* v. *Ogilvie*, there is even more reason to hold that mootness does not bar decision of the constitutional question presented here.

Reaching the merits, I would reverse, for the reasons stated by MR. JUSTICE MARSHALL in his dissenting opinion, which I join.

MR. JUSTICE MARSHALL, dissenting.

I agree with my Brother BRENNAN that this case is not moot. It involves one of those problems "capable of repetition, yet evading review," which call for relaxation of traditional concepts of mootness so that appellate review of important constitutional decisions not be permanently frustrated. *Moore* v. *Ogilvie*, 394 U. S. 814, 816 (1969).

Indeed, one of the unfortunate consequences of a rigid view of mootness in cases such as this is that the state and lower federal courts may well be left as the courts of last resort for challenges of relatively short state residency requirements. Those courts may, as the District Court apparently did in this case, consider them

*The proceedings would probably require even more time if the plaintiff sued in state court, for review in this Court would come only after one or more levels of state appellate review.

selves bound by this Court's summary *per curiam* affirmance in *Drueding* v. *Devlin*, 380 U. S. 125 (1965), affirming 234 F. Supp. 721 (D. C. Md. 1964), which upheld a one-year residency requirement for voting in a presidential election. It seems to me clear that *Drueding* is not good law today. The difficulties of achieving review in this Court in cases of this sort, combined with this misleading precedent, lead me to indicate briefly my view of the merits of the case before us.

In *Drueding*, the District Court tested the residency requirement there challenged by the equal-protection standard applied to ordinary state regulations: that is, restrictions need bear only some rational relationship to a legitimate end. 234 F. Supp., at 724–725, citing *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961). But if it was not clear in 1965 it is clear now that once a State has determined that a decision is to be made by popular vote it may exclude persons from the franchise only upon a showing of a compelling interest, and even then only when the exclusion is the least restrictive method of achieving the desired purpose. *Harper* v. *Virginia Board of Elections*, 383 U. S. 663, 667 (1966); *Kramer* v. *Union School District*, 395 U. S. 621, 626–628 (1969). Close scrutiny is thus demanded of Colorado's requirement that in order to vote for President and Vice President, one must not only be a resident of that State but one must have been a resident for a certain time before the election—six months when this suit was brought, now, two months.

In support of this requirement, it is urged that the electoral college system as embodied in the Constitution contemplates the election of the President and Vice President, not by the Nation as such, but rather by the individual States, each acting as a community. Hence the argument goes, each State may legislate to ensure that those voting for its presidential electors are truly members of the state community.

The argument is surely correct as far as it goes, and this Court has often reaffirmed the power of the States to require their voters to be bona fide residents. *Carrington v. Rash*, 380 U. S. 89, 93-94 (1965); *Kramer v. Union School District*, *supra*, at 625. But this does not justify or explain the exclusion from the franchise of persons, not because their bona fide residency is questioned, but because they are recent rather than longtime residents.[1]

Nor is it a justification to say that the State has certain parochial interests at stake in the election of a President, and that it may require of its voters a period of residency sufficiently lengthy to impress upon them the local viewpoint. This is precisely the sort of argument which this Court, in *Carrington v. Rash*, *supra*, found insufficient to justify Texas' exclusion from voting in state elections of servicemen who had acquired Texas residency after they had entered the service. The State argued that military men newly moved to Texas might not have local interests sufficiently at heart. This Court replied:

> "But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation.
>
> "Fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." 380 U. S. at 94.

Similarly here, the fact that newly arrived Coloradans may have a more national outlook than longtime residents, or even may retain a viewpoint characteristic of

[1] *Pope v. Williams*, 193 U. S. 621 (1904), upheld a one-year residency requirement for voting in state elections. The Court specifically reserved the question of durational residency requirements as applied to voting in presidential elections. *Id.*, at 633. In any case, *Pope* was decided long before application of the "compelling interest" test to restrictions on the franchise.

the region from which they have come, is a constitutionally impermissible reason for depriving them of their chance to influence the electoral vote of their new home State.

Nor does it suffice to argue that a durational residency requirement ensures that voters have had the time to gain knowledge of local issues, as distinguished from indoctrination in local attitudes. Even if it can be assumed that new residents know less about local issues than old residents, issues of this sort play so small a part in the election of the President and Vice President today that this can hardly be considered a compelling interest sufficient to justify entirely depriving millions of Americans of any opportunity to vote for their most important leaders. Cf. *Kramer* v. *Union School District*, *supra*, at 633.

The State argues that its durational residency requirement is necessary to ensure the purity of its elections. The impurities feared ("dual voting" and "colonization") all involve the same evil—voting by nonresidents, either singly or in blocks. But it is difficult to see how the durational residency requirement in any way protects against nonresident voting. The qualifications of the would-be voter in Colorado are determined when he registers to vote, which he may do until 20 days before the election. Colo. Rev. Stat. Ann. § 49–4–2 (1) (Supp. 1965). At that time, he establishes his qualifications, including durational residence, by oath. Colo. Rev. Stat. Ann. § 49–4–17 (Supp. 1965). The nonresident, seeking to vote, can as easily falsely swear that he has been a resident for a certain time, as he could falsely swear that he is presently a resident. The requirement of the additional element to be sworn—the duration of residency—adds no discernible protection against "dual voting" or "colonization" by voters willing to lie. Insofar as appears from the Colorado election laws, and from the record in

this case, the State makes no independent attempt to go behind the voter's oath to determine his qualifications. See Colo. Rev. Stat. Ann. § 49–13 (Supp. 1965).

Moreover, even if an enforcement effort were made to prevent nonresident voting, and the exclusion of those taking up residency within two months of the election were used as a method of eliminating cases on the borderline between new residents and mere visitors, such an approach would be constitutionally overbroad. In *Carrington* v. *Rash*, *supra*, the State similarly argued that it was in many instances difficult to tell whether persons moving to Texas while they were in the service had the genuine intent to remain that establishes residency. Thus, the argument went, the administrative convenience of avoiding difficult factual determinations justified a blanket exclusion of all those in the doubtful category. The Court rejected such a "conclusive presumption" approach, noting that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." 380 U. S., at 96. Cf. *Harman* v. *Forssenius*, 380 U. S. 528, 542–543 (1965).

Similarly here, a conclusive presumption that a recently established resident is not a resident at all for voting purposes is simply an overbroad burden upon the right to vote. In most cases, it is no more difficult to determine whether one recently arrived in the community has sufficient intent to remain to qualify as a resident than it is to make a similar determination for an older inhabitant.[2] That there are borderline cases among the new

[2] For instance, the appellants in this case, before applying for their ballots, had bought a home in Colorado Springs, registered their car with the Colorado Department of Motor Vehicles, acquired Colorado drivers' licenses, and registered their eldest child in a private nursery school; further, Mr. Hall had taken permanent employment with a law firm in Colorado Springs.

arrivals is not a constitutionally sufficient reason for denying the vote to those who have settled in good faith.

Finally, the State argues that the logistics of preparing for an election require that there be some time between the close of registration and the election itself. This period serves as a kind of residency requirement, in that persons establishing residency after the voting lists are closed are barred from voting. Yet this requirement is justified by compelling administrative needs. And, it is argued, once some period of this sort is conceded to be required, it is arbitrary for the courts to determine as a matter of constitutional law how long it may be.

But this argument is unconvincing here. Colorado has apparently judged that administrative needs require 20 days between the close of registration and election day. Colo. Rev. Stat. Ann. § 49–4–2 (2) (Supp. 1965). Appellants have not challenged this statute. What they have challenged is the separate and additional requirement that voters, all of whom register before the 20-day cutoff date, also must have been residents of the State at least six months—by recent amendment two months—before the election. Colo. Rev. Stat. Ann. § 49–24–1 (1963). For the argument from logistical need to save the durational residency requirement, the State would have to show some additional administrative need for this further burden on the right to vote. No such showing has been made. In my view the Colorado durational residency requirement for voters for President and Vice President violates the Equal Protection Clause, and appellants are entitled to reversal of the District Court judgment which upheld that requirement.